Ang Theam Choom v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO R09–16 OF 2001
ABDUL HAMID MOHAMAD, KC VOHRAH AND MOHD NOOR AHMAD JJCA
25 OCTOBER 2002

Criminal Procedure *— Appeal — Conviction, against — Standard of proof — Magistrate mistakenly stated in grounds of judgment that the 'appellant' had to prove beyond reasonable doubt when it should have been the 'prosecution' — Whether wrong use of the word 'appellant' constituted a misdirection of law — Whether fatal to magistrate's decision here*

Criminal Procedure *— Appeal — Fact, finding of — Magistrate made finding of fact that appellant had not paid Employees Provident Fund contribution for employee — Whether appellate court should disturb findings of facts by magistrate*

Criminal Procedure *— Prosecution — Attorney General — Authority to conduct prosecution — Authority to conduct prosecution given after prosecution instituted but before trial began — Whether prosecution had commenced before authority to conduct the prosecution was given*

Labour Law *— Employment — Employer's duty — Failure to make contributions to employee's Employees Provident Fund — Appeal against conviction — Whether appellant had raised reasonable doubt on prosecution's case — Whether appellant was given opportunity to defend himself — Employees Provident Fund Act 1993 s 43(2)*

Words and Phrases *— 'To institute a proceeding' — Meaning of*

Words and Phrases *— 'To conduct a proceeding' — Meaning of*

The appellant was charged in the magistrate's court for failure to make contributions to his employee's Employees Provident Fund ('EPF') for the month of February 1991, as required by reg 3 of the Employees Provident Fund Regulations 1991, thereby committing an offence punishable under s 43(2) of the Employees Provident Fund Act 1993 ('the Act'). The appellant was found guilty, convicted and sentenced to a fine of RM500 in default 14 days imprisonment. He was also ordered to pay a sum of RM802 and interest thereon at 6.7%pa until full and final payment, under s 63(1) of the Act. This amount was the contribution in respect of the employee that should have been paid but was not paid. The appellant's appeal to the High Court was dismissed. Having obtained leave of this court, he appealed to this court. The first ground of appeal concerned the standard of proof. The learned magistrate had said in his grounds of judgment that 'Orang Kena Saman mesti buktikan melampaui keraguan munasabah'. However, he later said, 'Orang Kena Saman telah gagal menimbulkan keraguan munasabah atas kes pendakwaan.' The High Court judge held that the wrong use of the words 'Orang Kena Saman' used in the first sentence above did not constitute a misdirection of law and was not

fatal to the decision of the learned magistrate. The second ground concerned the order made by the learned magistrate in ordering the appellant to pay RM802 (being EPF contributions due to the employee) and interest thereon for arrears of the contributions. Counsel for the appellant said that the magistrate's order was unconstitutional as the appellant was not given an opportunity to defend himself and the amount was not stated in the charge. The third ground concerned the authority to conduct the prosecution. The authority to conduct the prosecution was given on 3 June 1998 and in the charge sheet, the figures '15/5' (or 15 May 1998) were written under the column 'Date of first appearance'. As such, according to the counsel for the appellant, prosecution had commenced before authority to conduct the prosecution was given.

Held, dismissing the appeal:

(1) It was clear from the context that the words 'Orang Kena Saman' (or 'the appellant') in the first sentence were somehow used in place of the words 'Pihak Pendakwaan' (or 'the prosecution'). The fact that the magistrate meant the prosecution was clear from the following sentence when he correctly stated that the 'Orang Kena Saman' (meaning the appellant) had failed to raise a reasonable doubt (see p 407F–G).

(2) The issue here was whether the appellant had paid EPF contribution for his employee in respect her wages for the month of January in 1991. On the facts, the learned magistrate was satisfied that the appellant had not. The learned High Court judge was of the view that he should not disturb the findings of facts by the magistrate. This court too had no reason to disturb that finding of facts (see p 407G–H).

(3) In respect of the second ground of appeal, the appellant was not charged for a criminal offence for failure to pay the amount due and that was why the amount was not stated in the charge. Further, s 63(1) of the Act provided that the court, before which the employer was found guilty, must order such employer to pay to the EPF contributions to the Board, which amount was certified by an officer authorized by the Board to be due from such employer, prior to the date of such finding of guilt. Hence, all that s 63(1) required was that such amount due (in the instant case, RM802) be certified by an officer authorized by the Board, which had been done in the instant case (see pp 408A–B, E–F).

(4) As for the submission that the appellant had not been given an opportunity to defend himself, the appellant had been informed in a letter by EPF that he had failed to pay the employee's EPF contributions totaling RM802 and was told to pay within 14 days. The appellant did not pay as directed. As such, he cannot claim that he did not know about it, or could not have disputed it. The appellant had the opportunity to dispute the amount

A when the account was produced in court but he failed to do so (see p 408G–I).

(5) Cases on sanction should be distinguished because where sanction was required, no prosecution can commence unless it was sanctioned by the public prosecutor (unless sanction was B excused under the circumstances provided in s 422 (b) of the Criminal Procedure Code). In the case of 'consent to prosecute', no prosecution may be instituted except by or with the consent of the public prosecutor and want of consent is not excusable under s 422 of the Criminal Procedure Code. In the instant case, it was the 'authority to conduct the prosecution' that was in issue. So C long as the authority to conduct the prosecution was given before the trial began, it should be sufficient as it was only at the trial stage that a prosecution was conducted. 'To institute' a proceeding should be distinguished from 'to conduct' a proceeding. Institution was the earlier stage while 'conducting' was the later stage, more properly referred to the trial stage. In this D case, as the prosecuting officer had in fact been given the authority to conduct the prosecution of the appellant, he had the authority to do so (see pp 409E–G, 410A); *Public Prosecutor v Datuk Harun bin Idris & Ors* [1976] 2 MLJ 116 followed.]

E **[Bahasa Malaysia summary**

Perayu dituduh di mahkamah majistret atas kegagalan mencarum kepada Kumpulan Wang Simpanan Pekerja ('KWSP') pekerjanya untuk bulan Februari 1991, seperti yang dikehendaki oleh peraturan 3 Peraturan-peraturan Kumpulan Wang Simpanan Pekerja 1991, F dengan itu melakukan kesalahan yang boleh dihukum di bawah s 43(2) Akta Kumpulan Wang Simpanan Pekerja 1993 ('Akta tersebut'). Perayu didapati bersalah, disabit dan dihukum denda sebanyak RM500 jika ingkar penjara selama 14 hari. Ia juga diperintah membayar jumlah sebanyak RM802 dan faedah atasnya pada kadar G 6.7% setahun sehingga bayaran penuh dan terakhir, di bawah s 63(1) Akta tersebut. Amaun ini merupakan caruman berhubung dengan pekerja yang seharusnya dibayar tetapi tidak dibayar. Rayuan perayu kepada Mahkamah Tinggi ditolak. Setelah memperolehi kebenaran dari mahkamah ini, beliau membuat rayuan kepada mahkamah ini. Alasan rayuan pertama berkaitan dengan darjah membukti. Majistret H yang arif telah berkata dalam alasan penghakiman beliau bahawa 'Orang Kena Saman mesti buktikan melampaui keraguan munasabah'. Walau bagaimanapun, beliau kemudiannya berkata, 'Orang Kena Saman telah gagal menimbulkan keraguan munasabah atas kes pendakwaan.' Hakim Mahkamah Tinggi memutusksn bahawa penggunaan salah perkataan-perkataan 'Orang Kena Saman' I yang diguna dalam ayat pertama di atas tidak membentuk salah arah di sisi undang-undang dan tidak padah kepada keputusan majistret yang arif. Alasan kedua adalah berkaitan perintah yang dibuat oleh

majistret yang arif dalam memerintah perayu supaya membayar RM802 (yang berupa caruman KWSP yang harus dibayar kepada pekerja) dan faedah atasnya untuk tunggakan caruman. Peguam untuk perayu berkata bahawa perintah majistret adalah bertentangan dengan perlembagaan kerana perayu tidak diberi peluang untuk membela dirinya dan amaun tidak dinyatakan dalam tuduhan. Alasan ketiga berkaitan kuasa untuk menjalankan pendakwaan. Kuasa untuk menjalankan pendakwaan diberikan pada 3 Jun 1998 dan dalam kertas tuduhan, angka-angka '15/5' (atau 15 Mei 1998) ditulis di bawah ruangan 'Date of first appearance'. Oleh yang demikian, menurut peguam untuk pihak perayu, pendakwaan telah bermula sejurus sebelum kuasa untuk menjalankan pendakwaan diberikan.

Diputuskan, menolak rayuan tersebut:

(1) Adalah jelas daripada konteks bahawa perkataan-perkataan 'Orang Kena Saman' (atau 'perayu') dalam ayat pertama diguna dan bukannya 'Pihak Pendakwaan' (atau 'pihak pendakwaan'). Hakikat bahawa majistret bermaksud pendakwaan adalah jelas daripada ayat berikut apabila beliau menyatakan dengan betul bahawa 'Orang Kena Saman' (iaitu perayu) telah gagal menimbulkan keraguan munasabah (lihat ms 407F–G).

(2) Isu di sini adalah sama ada perayu telah membayar caruman KWSP untuk pekerjanya berhubung gaji untuk bulan Januari pada tahun 1991. Berdasarkan fakta-fakta, majistret yang arif puas hati perayu tidak berbuat demikian. Hakim Mahkamah Tinggi yang arif berpandangan bahawa beliau tidak harus mengganggu keputusan fakta oleh majistret. Mahkamah ini juga tidak mempunyai sebab untuk mengganggu keputusan fakta tersebut (lihat ms 407G–H).

(3) Berkaitan dengan alasan rayuan yang kedua, perayu tidak dituduh untuk kesalahan jenayah atas kegagalan membayar amaun yang harus dibayar dan itulah sebab amaun tidak dinyatakan dalam pertuduhan. Seterusnya, s 63(1) Akta tersebut memperuntukkan bahawa mahkamah, di hadapan mana majikan didapati bersalah, seharusnya memerintahkan majikan membayar caruman KWSP kepada lembaga, yang amaunnya disahkan oleh seorang pegawai yang diberikuasa oleh lembaga sebagai harus dibayar oleh majikan, sebelum tarikh keputusan mendapatinya bersalah. Justeru itu, apa yang dikehendaki oleh s 63(1) adalah agar amaun yang harus dibayar (dalam kes ini, RM802) disahkan oleh seorang pegawai yang diberikuasa oleh lembaga, yang telahpun dilakukan dalam kes ini (lihat ms 408A–B, E–F).

(4) Mengenai hujah bahawa perayu tidak diberi peluang untuk membela dirinya, perayu telah diberitahu dalam sepucuk surat dari KWSP bahawa ia telah gagal membayar caruman KWSP pekerja berjumlah RM802 dan hendaklah bayar dalam tempoh 14 hari. Perayu tidak membayar seperti yang diarahkan. Oleh

yang demikian, ia tidak boleh menuntut bahawa ia tidak tahu tentangnya, atau tidak mungkin mempertikaikannya. Perayu mempunyai peluang mempertikaikan amaun apabila akaun dikemukakan di mahkamah tetapi gagal berbuat demikian (lihat ms 408G–I).

(5) Kes-kes mengenai sanksi harus dibezakan kerana di mana sanksi dikehendaki, tiada pendakwaan boleh bermula melainkan disanksikan oleh pendakwa raya (melainkan sanksi dikecualikan di bawah keadaan yang diperuntukkan dalam s 422(b) Kanun Acara Jenayah). Dalam kes 'consent to prosecute', tiada pendakwaan boleh dimulakan kecuali oleh atau dengan izin pendakwa raya dan kekurangan izin tidak boleh dimaafkan di bawah s 422 Kanun Acara Jenayah. Dalam kes ini, 'authority to conduct the prosecution' menjadi isu. Selagi kuasa untuk menjalankan pendakwaan diberikan sebelum perbicaraan bermula, adalah mencukupi kerana hanyalah di peringkat perbicaraan pendakwaan dijalankan. 'To institute' prosiding harus dibezakan daripada 'to conduct' prosiding. Permulaan merupakan peringkat yang lebih awal sedangkan 'conducting' adalah peringkat yang berikut, yang lebih wajar dirujuk sebagai peringkat perbicaraan. Dalam kes ini, oleh kerana pegawai pendakwa pada hakikatnya telah diberikan kuasa untuk menjalankan pendakwaan perayu, beliau mempunyai kuasa untuk berbuat demikian (lihat ms 409E–G, 410A); *Public Prosecutor v Datuk Harun bin Idris & Ors* [1976] 2 MLJ 116 diikut.]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.

For cases on employer's duty, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 847–892.

For cases on finding of fact, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 295–357.

For cases on prosecution of Attorney General, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2549–2614.

Cases referred to

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (folld)

Legislation referred to

Criminal Procedure Code ss 422(b), 177A, 377
Employees Provident Fund Act 1993 ss 43(2), 63(1)
Employees Provident Fund Regulations 1991 reg 3

Appeal from: Summons Case No 87–423 of 1997 (Magistrate's Court, Kangar)

Mohamad Afza bin Dahari @ Zahari (*Jayadeva & Kamal*) for the appellant.

Kamarul Hisham Kamaruddin (Deputy Public Prosecutor) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant was charged in the magistrate's court for failure to make EPF contribution of his employee, Norma bte Seman for the month of February 1991, as required by reg 3 of the Employees Provident Fund Regulations 1991, thereby committing an offence punishable under s 43(2) of the Employees Provident Fund Act 1993 ('the Act'). On 10 June 1991, he was found guilty, convicted and sentenced to a fine of RM500 in default 14 days imprisonment. He was also ordered to pay a sum of RM802 and interest thereon at 6.7%pa until full and final payment, under s 63(1) of the Act. This amount was the amount of the contribution in respect of the same employee that should have been paid but was not paid. He appealed to the High Court which dismissed the appeal. Having obtained leave of this court, he appealed to this court.

[To avoid any confusion, it is important to note that this appeal arises from the Kangar Magistrate's Court Summons Case No 87–423–97. There was another proceeding against him vide Kangar Magistrate's Court No 87–162–95. That case is not the subject matter of this appeal.]

The petition of appeal filed in respect of the appeal to this court contains three grounds:

(1) Yang Arif Hakim, telah terkhilaf dari segi undang-undang apabila memutuskan bahawa tahap beban bukti melampaui keraguan munasabah yang ditetapkan oleh Tuan Majistret terhadap perayu tidak fatal dan bukanlah suatu yang salah arah di dalam undang-undang.

(2) Yang Arif Hakim telah terkhilaf dari segi undang-undang apabila membenarkan perintah yang dibuat di bawah s 63 Akta Kumpulan Wang Simpanan Pekerja walaupun ia bercanggah dengan Perlembagaan Malaysia apabila perayu tidak diberi peluang untuk membuat pembelaan dan tidak ada di dalam pertuduhan.

(3) Yang Arif Hakim telah terkhilaf dari segi undang-undang apabila memutuskan bahawa perbicaraan adalah sah walaupun ia dijalankan oleh pihak yang bukan dari pihak pendakwaraya dan bercanggah dengan Perlembagaan Malaysia.

First ground

The first ground concerns the standard of proof. The learned magistrate had said in his grounds of judgment 'Orang Kena Saman mesti buktikan melampaui keraguan munsabah'. However, he later said, 'Orang Kena Saman telah gagal menimbulkan keraguan munasabah atas kes pendakwaan.'

The learned judge held that the unfortunate use of the words in the first quoted sentence above was not fatal to the decision of the learned magistrate. He noted that subsequently the learned magistrate 'had also quite correctly used the words' in the second quoted sentence above. The learned judge went on to say:

A The wrong choice of words does not constitute a misdirection of law. This issue could be resolved only after taking into consideration the evidence as a whole (see *Shamugam Munusamy v PP* [1999] 1 CLJ 783; and *Mohamad Jalani bin Saliman v PP* [1997] 5 MLJ 553). Incorrect choice of words by the magistrate does not nagate his decision unless there occurred a miscarriage of justice. What is clear from the notes of evidence in the instant case is that the B learned magistrate had directed himself and applied the correct standard of proof at the end of the prosecution case as well as the defence case. The appellant had said that he had pleaded guilty to a charge in case no 87–162–95 for non-payment of EPF dues and was ordered to pay the arrears of contributions for period January 1990 to January 1993, and did pay RM4,600 in respect of an employee named Nasir bin Yatim and Norma bte Seman for C January 1993. He was then given a breakdown statement of the respective amounts due before he was charged in case no 87–162–95. In this case, he was charged for non-contribution of EPF in respect of a worker name Norma bte Seman for January 1991, wages due in February 1991. His only defence was that his above payment of RM4,6000 in respect of case no 87–162–95 also covered Norma for her January 1991 wages. He laboured under his own misconception which later proved to be unfounded. The appellant did not D inform the EPF authorities that Norma was also employed by them before December 1992 (see exh P4 at p 82 of the RR). Thus, it was only after the charge under case no 87–162–95 was preferred that the authorities, upon further investigations, discovered that Norma was also working in January 1991. Consequently, based upon the complaint statement of Norma, the EPF authorities leveled the charge against the appellant in the subsequent instant E case. The appellant failed to show any prove that he had settled the EPF contribution for Norma in respect of her January 1991 wages.

Clearly, in this matter the magistrate had made a finding of fact (see pp 63–66 of the AR) and it is trite that an appellate court is averse to disturb a finding of fact unless such finding is clearly perverse and has led to a miscarriage of justice — which was not the case here (see *PP v Wan Razali* F *Kassim* [1970] 2 MLJ 79; *PP v Munusamy* [1980] 2 MLJ 133 and *Law Tim Wah v PP* [1978] 1 MLJ 167).

We agree with the learned judge. It is very clear from the context that the words 'Orang Kena Saman' were somehow used in place of the words 'Pihak Pendakwaan'. The fact that he meant the prosecution is clear from G the following sentence when he talked about the 'Orang Kena Saman' (meaning the appellant) having failed to raise a reasonable doubt, which as the learned judge said, and we agree, is correct.

As stated by the learned judge, the case did not involve complicated facts. The issue is whether the appellant paid his EPF contribution in respect of his employee Norma bte Seman for January 1991, wages due in H February 1991 or not. On the facts, the learned magistrate was satisfied that he had not. The learned judge was of the view that he should not disturb the findings of facts of the trial magistrate. This court too has no reason to disturb that finding of facts.

I *Second ground*

The second ground concerns the order made by the learned magistrate ordering the appellant to pay RM802 and interest thereon for arrears of the

contributions as provided by s 63(1) of the Act. Section 63(1), prior to the amendment by the Employees Provident Fund (Amendment) Act 2000 (Act A1080)) reads:

> (1) Notwithstanding the provisions of any other written law, where an employer is guilty of an offence under s 43(2) or s 48(3), the Court before which the employer is found guilty shall order such employer to pay to the Fund the amount of contributions, together with any dividend credited thereon, due and payable to the Board and certified by an officer authorized by the Board to be due from such employer, prior to the date of such finding of guilt.

The argument of the learned counsel appears to say that the order is unconstitutional as the appellant was not given an opportunity to defend himself and the amount was not stated in the charge. His written submission on this point consists of one sentence which consists of the ground stated in the preceding sentence. No argument was put forward. No elaboration was given. No authority was shown to us.

If the learned counsel wants to put forward a proposition of law, he must substantiate it with reasons and authorities. We do not even know on what grounds he made the proposition and on what authorities, if there are. We do not think we should step into his shoes and substantiate his proposition for him.

Be that as it may, it must be remembered that the argument is that the order is unconstitutional. As we understand him, he did not say that s 63 of the Act was unconstitutional. His two reasons for the argument are, first, the appellant had no opportunity to defend himself and secondly, the amount was not stated in the charge. We shall only confine ourselves to these two narrow grounds.

The point is, the appellant was not charged for a criminal offence for failure to pay the other amount due. That is why the amount was not stated in the charge. The question of 'defending' himself did not arise. That section provides for a consequential order for the payment of the amount of contributions due and payable to the Board and certified by an officer authorized by the Board to be due from such employer prior to the date of such finding of guilt. All that the section requires is that the amount must be certified by an officer authorized by the Board. That is to ensure the correctness of the amount. The 'Jadual Tunggakan Caruman' was produced as exh P4. The two amounts of RM572 on p 65 and RM230 on the following page add up to RM802. It was signed by the 'Pemeriksa Kanan, KWSP Negeri Perlis'. Both amounts are in respect of Norma bte Seman, the employee named in the charge. In fact, in a letter dated 17 November 1997 by the same officer to the appellant, the appellant was informed that he had failed to pay the EPF contributions of Norma bte Seman totaling RM802. He was told to pay within 14 days.

Clearly, he did not pay as directed. Whatever it is, he cannot claim that he did not know about it, or could not have disputed it, if he was of the view that the amount was wrong. Again, he had the opportunity to dispute it when the account was produced in court. He had himself to blame. So this ground too is without merit.

A *Third ground*

In both his written and oral submissions, the learned counsel for the appellant addressed us only on one point on this issue. He submitted that the authority to conduct the prosecution was only given on 3 June 1998. The trial commenced on 14 August 1998. However, he pointed out to the B charge sheet where in the column 'Name of Complainant, if any', the name Mohd Termizi bin L Karim appears. He submitted that Mohd Termizi was not a deputy public prosecutor nor a person empowered to prosecute.

This argument can be disposed off immediately. As the wording in the column clearly says, Mohd Termizi was the complainant, the person who C made the complaint to the magistrate. The 'Pengaduan' (Complaint) which is to be found in the record of appeal also shows that he was the complainant, not the prosecuting officer.

The learned counsel for the appellant also pointed out to the column 'Date of first appearance' in the charge sheet in which the figures '15/5' were D written. He submitted that prosecution had commenced by then but the authority to conduct the prosecution was only given on 3 June 1998. For the purpose of this argument, we will assume that '15/5' means '15/5/98'. So, it appears that the authority to conduct the prosecution was given after the summons had been issued and served but before the actual trial (meaning, the day the prosecution started calling its witnesses) began. In E our view, the cases on sanction should be distinguished. Where sanction is required, no prosecution can commence unless it is sanctioned by the public prosecutor. Even then, under the circumstances provided in s 422(b) of the Criminal Procedure Code, want of sanction is excused. In the case of 'consent to prosecute', no prosecution shall be instituted except by or with the consent of the public prosecutor — s 177A of the Criminal Procedure F Code. But want of consent is not excused by s 422 of the Criminal Procedure Code.

In our view, the prosecution cannot be instituted unless the consent or sanction is given (in the case of sanction, subject to s 422(b)). But, in the present case, it is the authority to conduct the prosecution that is in issue. G In our view, so long as it is given, in this case, before the trial began, it should be sufficient. It is at the trial stage that one really 'conducts' the prosecution.

Support for this proposition is found in the judgment of Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* H [1976] 2 MLJ 116 at pp 119–120:

> Pursuing its significance, 'to conduct' means to lead, guide, manage (*In re Bhupalli Malliah* AIR 1959 And Pra 477; *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149 at p 167 per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved *in the course of the trial* I and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence. (Emphasis added.)

Perhaps we may add that 'to institute' a proceeding should be distinguished from 'to conduct' a proceeding. Institution is the earlier stage while 'conducting' is the later stage, more properly refers to the trial stage. A

In this case, as the prosecuting officer was in fact given the authority to conduct the prosecution of the appellant, he had the authority to do so.

As the learned counsel for the appellant had chosen to argue this appeal on this narrow issue, ie the prosecuting officer had no authority to conduct the prosecution, we see no reason why we should go any further and consider the issue of the constitutionality of s 377 of the Criminal Procedure Code (as amended by the Criminal Procedure (Amendment) Act 1998 (Act A1015). B

On these grounds, we dismiss the appeal and confirm the order of the High Court and the magistrate's court. C

Appeal dismissed.

Reported by Lim Lee Na D

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